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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 16.

MARK O. DAVIS, Petitioner,

v.

MAUDE F. DAVIS.

PETITION FOR RECALL AND CLARIFICATION OF
MANDATE.

JOSEPH T. SHERIER,
Attorney for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

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No. 16.
—

MARK O. DAVIS, *Petitioner,*

v.

MAUDE E. DAVIS.

—
**PETITION FOR RECALL AND CLARIFICATION OF
MANDATE.**
—

The petitioner, Mark O. Davis, prays that an order be entered herein recalling the mandate of this Court, issued December 5, 1938, for the purpose of clarification, and for grounds of his petition respectfully shows to this Honorable Court:

On October 29, 1925, a decree was entered by the Supreme Court of the District of Columbia (now the District Court of the United States for the District of Columbia) granting the petitioner a divorce *a mensa et thoro* from the respondent on the ground of cruelty. The custody of a son was awarded to the petitioner and that of a daughter to the respondent. It directed petitioner to pay \$300 a month for the

support of wife and daughter. At the date of this decree an absolute divorce was not permitted in the District of Columbia for desertion or cruelty, while in Virginia such a divorce was authorized where either party wilfully deserted or abandoned the other for three years. The circuit courts of that state have jurisdiction over suits for divorce and alimony.

Thereafter, the petitioner removed to Arlington County, Virginia, where, after residing for more than one year, he filed his bill for absolute divorce on the ground of desertion. The respondent appeared and contested the standing of the petitioner to maintain the action on the ground that he had not been a *bona fide* resident of the state for one year, as required by statute. Although denominated by respondent a special appearance, this Court has held her conduct amounted to a general appearance.

After hearing, the court held the petitioner had standing to maintain his action. Although seasonably notified of subsequent proceedings in the cause, respondent did not further participate therein. On June 26, 1929, a decree granted petitioner an absolute divorce, without alimony to the respondent.

On December 30, 1929, the petitioner applied to the District court to have its decree of October 29, 1925, set aside or modified *so as not to require him to pay any amount for maintenance of respondent*. She appeared and opposed the application, but raised no question as to the jurisdiction of the Virginia court. The petition was denied, and the United States Court of Appeals for the District of Columbia affirmed on the ground that the District court retained jurisdiction to enforce or modify its order for maintenance of the wife and daughter; and that the removal to Virginia of the petitioner did not invest the courts of that State with authority to annul or supersede that jurisdiction. It held that the District court, having first acquired jurisdiction of the subject matter, its authority continued until the cause was finally disposed of. Neither the district court nor the

court of appeals considered or decided any question as to the jurisdiction of the Virginia court.

On April 16, 1935, the petitioner filed in the district court another application to have its decree set aside or modified *as before prayed*. He sought relief on three grounds: The decree of the Virginia court, the fact that his daughter had married and was no longer living with respondent, and diminution of his income. The respondent answered, alleging that petitioner never was a resident of Virginia and denying the desertion found by the Virginia court. At the hearing, the petitioner abandoned his claim for relief on the ground of diminution of income. His petition was denied.

On appeal, the court below adhered to its earlier ruling that the district court retained jurisdiction, held that the Virginia decree was not entitled to full faith and credit in the District of Columbia, but reversed the cause on the ground that the district court should have considered the effect of the marriage of the daughter on the question of reduction of allowance to the respondent. This Court granted *certiorari*.

In its opinion, announced by Mr. Justice Butler on November 7, 1938, 83 L. ed. 52, this Court reversed the court of appeals, holding that it was the duty of the district court, under Article IV, Sec. 1 of the Constitution, to recognize the Virginia decree awarding the petitioner an absolute divorce without alimony to the respondent, and to give that decree "not some, but full credit." In the course of the opinion, it was stated:

Petitioner frankly presented to the Virginia court the grounds on which he sought release. He gave respondent actual notice of the suit. She appeared, especially as she maintains, and raised and tried the question whether he had standing to sue. In view of these facts, and of her conduct, adjudged repugnant to the marital relation, *it would be unreasonable to hold that his domicile in Virginia was not sufficient to entitle*

him to obtain a divorce having the same force in the District as in that State. * * *

Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia. The decree of the court of appeals must be reversed; the case will be remanded to the district court for proceedings in conformity with this opinion.

Thereafter, upon the filing of the mandate of this Court in the district court, the petitioner moved for a decree thereon. Among others, his proposed decree contained the provision: "The decree entered herein October 29, 1925, be and it is hereby vacated insofar as it awarded alimony to the defendant." Objection to the entry of the decree was made on the ground that this Court had decided that the petitioner was entitled to have the Virginia decree recognized only insofar as it dissolved the marriage relation, but had not determined that such recognition required the vacation of the alimony provision of the decree of October, 1925. Respondent's contention was based upon the following statement in the opinion of this Court: "No question is here presented as to the effect of the Virginia decree upon the power of the District of Columbia court over alimony." Petitioner claimed the language employed had reference to the holding of the court of appeals to the effect that the District and Virginia courts were tribunals of concurrent jurisdiction and that the District court having first acquired jurisdiction of the subject matter, the Virginia court was without authority to annul or supersede that jurisdiction.

Respondent also moved the court for a decree, recognizing the Virginia decree only insofar as it dissolved the marriage, and for an order adjudging the petitioner in contempt for failure to pay alimony after the announcement by this Court of its opinion.

The motions were submitted on briefs and, on March 13, 1939, Bailey, J., filed the memorandum opinion attached hereto as an appendix and made a part of this petition, in which he indicated his intention to enter the decree pro-

posed by the respondent, thus following the decision of the court of appeals, notwithstanding its reversal by this Court. Such a decree, it is submitted, would violate the mandate of this Court and be clearly in conflict with the conclusions expressed in its opinion.

The court of appeals having held that the lower court committed error in not giving consideration to the marriage of the daughter on the question of reduction of alimony, the only question remaining for review by this Court was whether the court of appeals erred in denying the prayer of the petitioner that the Virginia decree be recognized to the extent of vacating the alimony provision of the decree of October, 1925. Obviously, this Court would not have reversed the court of appeals unless it concluded that its judgment in the latter respect was erroneous. It is believed this position finds support in the action of this Court in remanding the cause, not to the court of appeals, but directly to the district court.

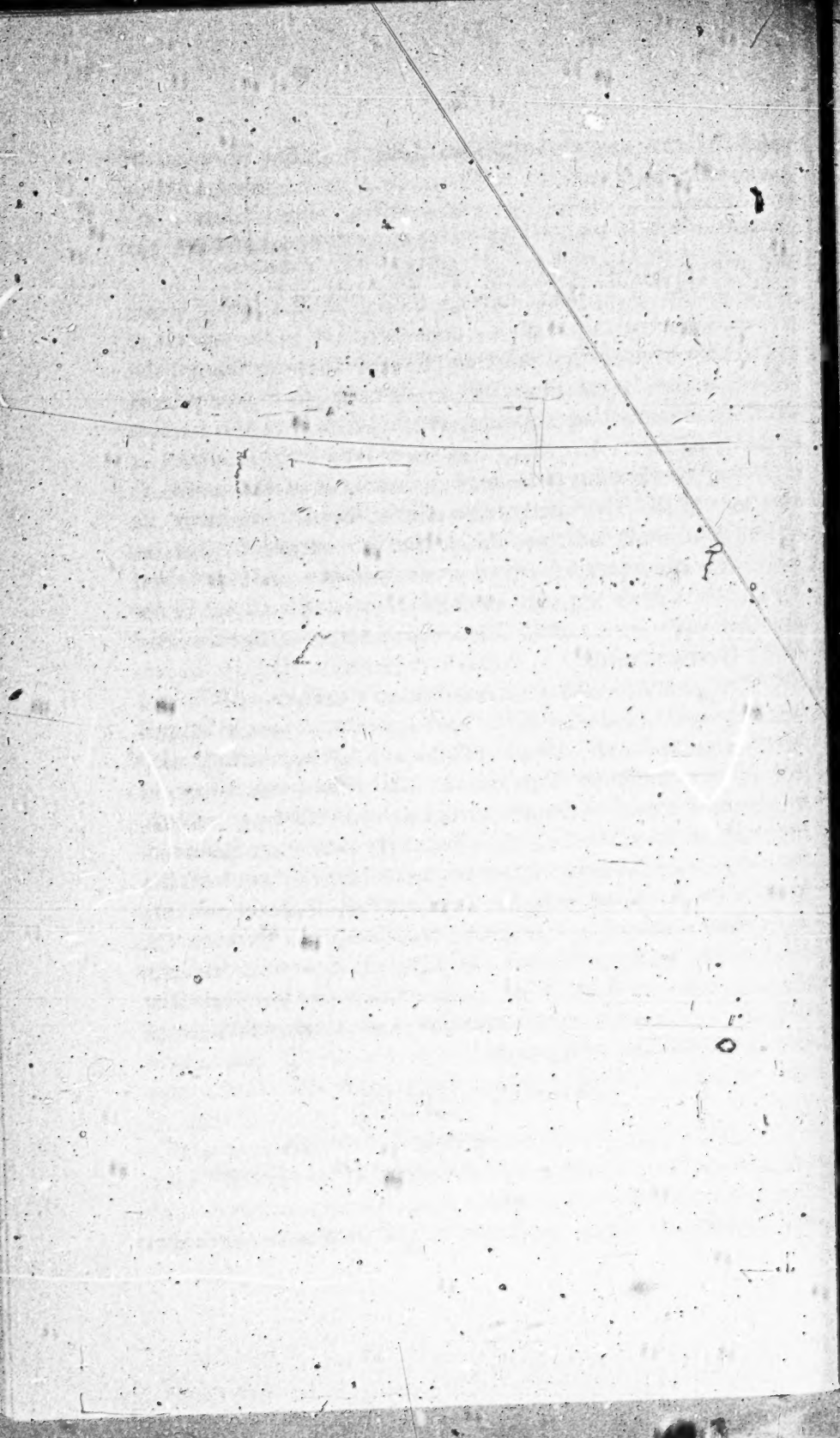
Unless relief is obtainable in this Court, the petitioner will be subjected to the delay and expense of again litigating the cause in the lower courts and, if permitted, ultimately bringing it to this Court; and, in the meantime, will be required to pay alimony at the rate of \$300 per month, with little hope of having the amount so paid ever restored.

In view of the apparent uncertainty on the part of the district court as to whether, under the decision of this Court, the alimony provision of the decree of October 29, 1925, should be vacated, and the Virginia decree given full, and not some, effect, it is respectfully prayed that the mandate of this Court be recalled and so clarified as to remove all doubt on this point.

Respectfully submitted,

JOSEPH T. SHERIER,

Attorney for Petitioner.



APPENDIX

Filed Mar. 13, 1939.

Charles E. Stewart, Clerk.

In the District Court of the United States for the District
of Columbia.

Equity No. 43,763.

DAVIS, Plaintiff,

v.

DAVIS, Defendant.

The husband obtained a limited divorce from his wife in this court, but was ordered to pay alimony and the court retained jurisdiction under the statute as to the question of alimony. In December, 1929, the husband sought to have the decree modified so as to provide for the support of the daughter only, basing his demand upon the fact that he had obtained in the meanwhile an absolute divorce from his wife in Virginia. The application was denied and the action of the trial court affirmed by the Court of Appeals, the latter court holding that the trial court retained jurisdiction as to alimony and the support of the daughter, but did not decide as to whether or not the Virginia court had jurisdiction to grant the divorce. In April, 1935, the husband again sought to have the court set aside or modify its decree upon the ground that the daughter had married, and also offered in evidence the decree of the Virginia court. The court denied the application. On appeal, the Court of Appeals held that the Virginia decree was not entitled to full faith and credit, Virginia not having been the last matrimonial domicile of the parties. It held that the trial court was in error in failing to consider the effect of the marriage of the daughter and reversed upon that ground.

The Supreme Court granted certiorari and held that the wife had submitted to the Virginia court the question of her husband's domicile and had also appeared generally in the case and was bound by the action of the Virginia court; also

that the lower courts had erred in not giving full faith and credit to the Virginia decree. The Court stated, however: "No question is here presented as to the effect of the Virginia decree on the power of the District of Columbia Court over alimony."

In one of the appeals in this case (*Davis v. Davis*, 61 App. D. C. 48) the Court of Appeals said:

"Therefore, according to the statutes of the District of Columbia, the lower court, after passing upon the decree of divorce in the case, retained jurisdiction of the parties and the cause with authority to enter further and additional orders therein respecting the alimony of the wife and the care and custody of the minor daughter. The court accordingly was vested with authority to continue and enforce its orders already entered in these respects. The removal of the plaintiff's residence to the state of Virginia, even if lawfully accomplished, cannot invest the courts of that state with authority to annul or supersede that jurisdiction."

The result is, I think, that this court retains jurisdiction for the purpose of enforcing or modifying its decree for alimony. The Thompson and Bloedorn cases are not in point. In each, the wife sought maintenance under the statute allowing the wife to require the husband to make provision for her support. Upon the divorce she ceased to be the wife, and was not entitled to relief under the statute. Under the law of the District of Columbia, the husband can be required to contribute to the wife's support even though he be the successful party in a suit for divorce.

The question of the modification of the order for alimony by reason of the marriage of the daughter should be set for hearing, and pending that hearing no action will be taken on the other motions made in this cause, other than the entry of an order on the mandate. As to the latter, I am inclined to think that the one submitted by counsel for

the wife is proper, but am willing to hear any objections
that may be raised by counsel for the husband.

BAILEY, J.

A true copy.

Test:

CHARLES E. STEWART, Clerk.

By: LYDIA M. GARDINER,
Asst. Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 16.—OCTOBER TERM, 1938.

Mark O. Davis, Petitioner,
vs.
Maude E. Davis.

On Writ of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia.

[November 7, 1938.]

Mr. Justice BUTLER delivered the opinion of the Court.

The lower court held a decree of the circuit court of Arlington County, Virginia, entered June 26, 1929, granting petitioner an absolute divorce from respondent upon the ground of desertion not entitled to recognition in the supreme (now district) court of the District of Columbia. The question arose upon his application to that court to set aside or modify a decree it entered October 29, 1925 granting him divorce *a mensa et thoro* from respondent on the ground of cruelty.

In the District of Columbia absolute divorce was not then permitted for desertion or cruelty.¹ In Virginia absolute divorce was authorized where either party willfully deserted or abandoned the other for three years.² The circuit courts there have jurisdiction over suits for divorce and alimony. No suit for divorce is maintainable unless one of the parties has been domiciled in the State for at least a year preceding its commencement.³

Petitioner and respondent married in 1909 and, until about the time he brought the suit for limited divorce, lived together in the District of Columbia. They had a son and daughter. The decree of separation awarded to him custody of the son, to her custody of the daughter, and directed him to pay \$300 a month for support of wife and daughter.

Petitioner's complaint in the Virginia court alleged that he was a resident of that State for the requisite time, showed that re-

¹ D. C. Code, Tit. 14, § 63.

² Va. Code, 1924, § 5103.

³ Va. Code, 1936, § 5105.

Respondent was a resident of the District of Columbia, fully disclosed the proceedings and decree in the District court, and alleged continuous desertion commencing before and extending for more than three years after entry of that decree. Process of the Virginia court was served personally upon the respondent in the District of Columbia. She filed a plea stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the court." In that document she alleged that neither she nor petitioner had been a resident of Virginia for a year before commencement of the suit and asserted that he was not then a bona fide resident there but that the residence he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce and was therefore a fraud upon the court and not residence in contemplation of law. The plea prayed judgment whether the court "can or will take any further cognizance of the action aforesaid."

The court entered a decree reciting that the cause came on for hearing upon the complaint, exhibits, other papers, and "argument of counsel" and referring the cause to a commissioner in chancery to ascertain and report whether the court had jurisdiction to hear and determine it and whether a decree of divorce should be entered. The commissioner reported that "by stipulation of counsel it was agreed" that he should only ascertain the facts raised in the plea to the jurisdiction and that no other matter should be inquired into or reported; that he had taken all the testimony submitted by the parties; that in his opinion petitioner was a bona fide resident of Arlington County, Virginia, and that the court had jurisdiction to hear and determine the cause.

Respondent filed exceptions, reiterating the allegations of her plea and asserting that the commissioner's findings were contrary to the evidence. There was a hearing upon the report and exceptions. After argument of counsel for the parties and upon consideration of the evidence, the court found that petitioner was a resident of Arlington County, Virginia, for the requisite time, that it had jurisdiction of the "subject matter and of the parties," overruled the exceptions, and confirmed the report. Respondent having signified her desire to apply for an appeal, the court ordered operation of the decree suspended for a period of thirty days. It also granted respondent ten days "within which to file such answer

or other pleadings in this cause as she may wish." She did not appeal or file answer or other pleading.

The final decree states that the case came on for hearing upon specified papers and depositions of five named persons taken before a commissioner pursuant to notice served in Arlington County, as counsel who had entered special appearance for respondent, and upon her personally in the District of Columbia. It found: Respondent willfully deserted petitioner February 24, 1925; the desertion continued from that date; three years had elapsed since the entry of the decree *a mensa et thoro*; there has been no reconciliation, and none is probable. It granted petitioner absolute divorce, divested respondent of all rights in his property, and required him to pay \$150 per month for support of the daughter. No alimony was allowed respondent.

December 30, 1929 petitioner applied to the District court to have its decree set aside or modified so as not to require him to pay any amount for maintenance of respondent but to provide for the payment of a reasonable sum for the support of their daughter. The application was based solely upon the Virginia decree. Respondent appeared and opposed the application but raised no question as to the jurisdiction of the Virginia court. It was denied. The court of appeals affirmed on the grounds that the lower court, having entered the decree, retained jurisdiction to enforce or modify its order for maintenance of the wife and daughter; that petitioner's removal to Virginia did not invest the courts of that State with authority to annul or supersede that jurisdiction; and that, the District court having first acquired jurisdiction of the subject matter, its authority continues until the matter is finally disposed of. 57 F. (2d) 414. In passing upon that application, neither court considered or decided any question as to jurisdiction of the Virginia court.

April 16, 1935 petitioner filed in the District court another application to have its decree set aside or modified as before prayed. He then sought relief on three grounds: The decree of the Virginia court, the fact that his daughter had married and was no longer living with respondent, and diminution of his income. Respondent answered, alleging that petitioner never was a resident of Virginia and denying the desertion found by the Virginia court. There was a hearing, at which petitioner offered evidence showing the proceedings and decree in the Virginia court, the mar-

riage of the daughter and that she was living with her husband. Then counsel for respondent applied for time to secure her attendance and that of witnesses who, as he said, would give testimony that petitioner went to Virginia for the sole purpose of getting a divorce, and that he never became a bona fide resident there. Petitioner's counsel admitted that, if present, respondent and the witnesses referred to would so testify, but insisted that the testimony would be incompetent. Respondent offered no other evidence. The trial court denied the application.

The court of appeals, in an unreported opinion, held its earlier decision established the law of the case. Declaring petitioner not responsible for maintenance of his daughter after her marriage, it held that fact should be taken into account, and remanded the case for further consideration as to the amount of alimony to be allowed respondent. Petitioner applied for and the court granted rehearing. It heard argument and filed an opinion, in which it adhered to its ruling that its earlier decision was the law of the case, and held that the decision of the lower court refusing to enforce petitioner's decree of absolute divorce should stand. It said: "The Virginia court did not have full jurisdiction of the parties and the subject matter, and hence the decree was not entitled to full faith and credit. . . . It was necessary . . . under *Haddock v. Haddock* [201 U. S. 562] . . . that Virginia be the last matrimonial domicile of the parties or, if not, that the wife be subjected to the jurisdiction of the court below, either by personal service within the State, or by voluntary appearance and participation in the suit". It held that the matrimonial domicile was not in Virginia; that respondent's special appearance did not give the Virginia court full jurisdiction, or constitute waiver of her objection to jurisdiction. It held petitioner's application one addressed to the discretion of the lower court and that its omission to consider the marriage of the daughter constituted failure to exercise discretion. Accordingly, it reversed and remanded for further proceedings in accordance with the opinion. 96 F. (2d) 512.

Art. IV, § 1 requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other State.⁴ The Act of May 26, 1790, 1 Stat. 122, as amended, R. S.

⁴ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

§ 905, 28 U. S. C. § 687 declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every "court within the United States as they have by law or usage in the courts of the State from which they are taken."⁵ Thus Congress rightly interpreted the clause to mean not some but full credit. *Haddock v. Haddock*, *supra*, 567. The Act extended the rule of the Constitution to all courts, Federal as well as State. *Hills v. Duryee*, 7 Cr. 481, 485.

As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commission's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. *Baldwin v. Traveling Men's Assn.*, 283 U. S. 522, 525-526. Ser's

Nor can it be said that the domicile was not adequate to support, in virtue of the rule of full faith and credit established by Congress, decree enforceable in the courts of the District of Columbia. Depending on the connection in which used, various meanings have been attributed to the phrase matrimonial domicile. See *Atherton v. Atherton*, 181 U. S. 155, 171; *Andrews v. Andrews*, 188 U. S. 14, 40; *Haddock v. Haddock*, *supra*, 572; *Thompson v. Thompson*, 226 U. S. 551, 562. Definition, inclusive and exclusive, is not to be found; it need not be attempted here. It is enough to say that care should always be taken to determine upon the facts and circumstances of each case whether, in accordance with the general rule, it is the domicile of the husband. See *Cheely v. Clayton*, 110 U. S. 701, 705; *Thompson v. Thompson*, *supra*. Cf. *Barber v. Barber*, 21 How. 592, 594; *Cheever v. Wilson*, 9 Wall. 108, 124. In this case, the

⁵ "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

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wife has been adjudged by the decree *a mensa et thoro*, on which she relies, to have disrupted the marital relation. And by the decree of the Virginia court, the enforcement of which she opposes, she is adjudged to have persisted in desertion of petitioner for a period more than sufficient to entitle him under the laws of that State to dissolution of the bonds. Cf. *Harding v. Harding*, 198 U. S. 317, 338-339. While in that State litigating the question of his standing to sue, she chose not to answer charges of willful desertion.

This case differs essentially from *Haddock v. Haddock*, *supra*, relied on by the lower court. There the husband, immediately after marriage in New York, fled to escape his marital obligations and never returned to discharge any of them. The wife remained in that State. He acquired domicile in Connecticut and there obtained absolute divorce. She did not appear in the Connecticut court for any purpose. There was no suggestion that she was at fault or did anything to disrupt the marital relation. In this case, there exists none of the reasons on which we held the New York court not bound by the full faith and credit clause to enforce in that State the husband's Connecticut divorce. Petitioner frankly presented to the Virginia court the grounds on which he sought release. He gave respondent actual notice of the suit. She appeared, specially as she maintains, and raised and tried the question whether he had standing to sue. In view of these facts, and of her conduct, adjudged repugnant to the marital relation, it would be unreasonable to hold that his domicile in Virginia was not sufficient to entitle him to obtain a divorce having the same force in the District as in that State.

As to respondent's appearance in the Virginia court.—The assertion in her plea that it was special and made for the sole purpose of challenging jurisdiction is of no consequence if in fact it was not so limited. *Sugg v. Thornton*, 132 U. S. 524, 530. *Sterling Fire Corporation v. Sullivan*, 279 Fed. 336, 339. If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together.

There had been no claim of jurisdiction over her person. The plea did not challenge jurisdiction over petitioner or the court's

authority, if appropriately invoked, to grant the decree petitioner sought. It merely asserted that he lacked domicile required by Virginia law. Her allegations and prayer show that the sole purpose of the plea was to join issue with petitioner's allegation of domicile in Virginia, to secure a finding against him on that point, to obtain decree that he had no standing to bring the suit and so put an end to his efforts to obtain divorce in that State.

The recital in the decree of reference, that the cause came on for hearing upon, *inter alia*, argument of counsel, suggests that both parties were heard. The stipulation of counsel that the commissioner should only ascertain the facts raised by her plea shows action by both parties relating to merits, at least to the extent that it withdrew the case from the commissioner. The record discloses no challenge by respondent to the statement, in the decree overruling her exceptions, that the court had jurisdiction of the subject matter and of the parties. The grant of time within which to answer implies application to that end. A motion for such an order relates to merits. *Hupfeld v. Automaton Piano Co.*, 66 Fed. 788, 789. The service of notice of taking depositions upon respondent in the District of Columbia and upon her counsel in Virginia implies that petitioner's counsel understood that respondent had standing to appear and cross examine. Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties. Cf. *Andrews v. Andrews*, *supra*, 40.

No question is here presented as to the effect of the Virginia decree on the power of the District of Columbia court over alimony.

Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia. The decree of the court of appeals must be reversed; the case will be remanded to the district court for proceedings in conformity with this opinion.

It is so ordered.